

## Statement in Support of HB 5156 – December 3, 2013

Submitted by Bruce A. Timmons

SB 652, now 2013 PA 164, eff 11/12/2013, was enacted so quickly that obvious flaws were brushed aside. HB 5156 addresses the one issue that was perceived by some opponents as a basis for a federal court challenge – the removal of the right to a jury trial in matters where plaintiff would have been entitled to a jury trial under the law prior to PA 164. Whether an expedited “correction” by HB 5156 is designed to negate the federal court challenge or to restore a right to jury that proponents of SB 652 were unaware would be lost, HB 5156 does achieve the latter and should be supported accordingly.

HB 5156 has a few flaws of its own. Proposed modifications have been recommended to staff and to the Governor’s Office by several organizations. As of the time this statement is being written, an expected substitute has not been made available.

It is believed that the Substitute would clarify what is meant by preserving and maintaining a right to a jury trial as it existed prior to PA 164 or as created in the future for causes of action brought against the state, its officers, or employees. (There has never been a right to a jury in traditional court of claims cases and HB 5156 would not change that.) If a matter is triable by jury, that matter would seem to remain in the trial court and not in the court of claims.

However, HB 5156 indirectly amends MCL 600.6419 that made all claims against the state, its officers, and its employees exclusively a “court of claims” case. HB 5156 would now create an exception for any claim for which a right to jury attaches. That claim now becomes a circuit or trial court case.

Prior to PA 164, court of claims cases filed in Ingham Circuit were routinely joined with a related circuit court case in the county where the circuit court case was filed. Joinder facilitated one trial proceeding even though the court of claims matter was decided by the judge while other issues could be submitted to a jury, if requested. It was an efficient and practical solution.

HB 5156, as drafted, and PA 164 allow the state alone to decide to bifurcate cases that in any other context court rules would require to be joined. Unless the state consents to joinder of all claims at the circuit or other trial court, HB 5156 would require claims for declaratory or equitable relief to be heard in the reconstituted court of claims “until final judgment has been entered”. Whatever claim is otherwise triable in the circuit or other trial court, that claim has to (1) languish until the court of claims matter is final, however long that takes, and (2) be tried all over again – a duplicate trial process that was unnecessary and avoided before PA 164.

There is a court of claims matter that was joined with a related claim in circuit court in another county. As a result of PA 164, the court of claims matter was abruptly transferred to the reconstituted court of claims under the Court of Appeals. By definition, the circuit court claim may also be transferrable to the reconstituted court of claims under PA 164. HB 5156 may alter that. Maybe this will be an instance where the case will yet be joined at the circuit level. Mean-

while, attorneys and judges are in limbo as to what will happen to the circuit court case – whether it stays local (severed) or is joined with the court of claims matter, or whether both will again be joined in circuit court. PA 164 is causing confusion.

I have been told that 134 court of claims cases have been transferred to the Court of Appeals version, although as an interim step all cases are being processed under the case filing system of the Ingham Circuit court of claims. All cases transferred have been assigned to the 4 court of appeals judges assigned by the Supreme Court.

The transfer of circuit court cases is clearly a selective process, with only a few of the pending cases being transferred. Two whole cases have been transferred from Ingham Circuit and in another, a count involving one party has been transferred. One of the first to be transferred is the case involving the Board of Canvassers and the NERD fund – and I believe only part of the case was transferred. Another is a class action by prisoners that was transferred while the judge was considering objections to the court's proposed ruling. Now that case is before a Court of Appeals judge who is not familiar with the pleadings and orders to date.

Back in the 1980's and 1990's when Republicans in the Legislature were advancing tort reform, one of the complaints we addressed was forum shopping by plaintiffs. Limitations were placed on where cases could be filed so that pretext joinder of defendants could not cause a case to be filed in a county where judgments tended to be higher. HB 5156 and PA 164 together put the shoe on the other foot – and the first instance in my memory where the defense (namely "the state") gets to choose in which court to litigate a dispute. It is also the first time in my memory that the Legislature has removed pending and properly filed cases from the judge to which the case was assigned and transferred the case to another court and judge immediately upon enactment. There is no precedent for this.

For all the claims that PA 164 will send cases affecting the entire state to a more "representative" court, fully ¼ of the state is not represented because no judge was assigned from the 3<sup>rd</sup> district of the Court of Appeals; and where the case is heard depends upon where the judge sits – meaning citizens in the north and west parts of Michigan may have to go farther for a court hearing than if it were in Lansing or in the county where they live.

HB 5156, by restoring the right to a jury, does not make a silk purse out of the sow's ear known as PA 164. It still leaves a sour taste. It is an act of expediency. Many of us will continue to believe that PA 164 tampers with the court system to which challenges to state actions may be brought and attempts to bias the system against any threat of a legal challenge.

I am reminded of an exchange with Sir Thomas More in a Man for All Seasons. To paraphrase a longer excerpt, we should give the benefit of law to the devil, because if we flatten all the laws and protections to achieve whatever end we please, where will we hide when the devil turns on us?

Thank you.